FILE COPY

Office Supreme Court
FILED
APR 11 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITIONER'S PETITION FOR REHEARING

SVEINBJORN JOHNSON,
Counsel for Petitioner

OTTO KERNER,
Attorney General of Illinois

INDEX

	PAGE
Theory of Opinion Not Responsive to Petitioner's Position	2
The Holding	4
The Governing Statutes	4
Petitioner's True Contention	5
Conflict with Prior Decisions	6
Gibbons v. *Ogden* Misapplied	9
Groves v. *Slaughter*	11
The Citation from Story	15
Regulatory Exactions and Taxes Distinguished	18
Opinion Nullifies Certain Limitations	19
Commerce Clause Unduly Exalted	20
One Act; Several Sources of Power	21
States May Purchase Abroad	22
Right to Import Not Created by the Constitution	23
Power to Prohibit Foreign Commerce	25
Legal Propositions Not Noticed by This Court	25

CITATIONS

CASES:

Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427 21
Board of Trustees of the University of Illinois v. *United States*, 287 U. S. 2-3, 9, 11
Bryan v. *Bernheimer*, 181 U. S. 188 15
Buttfield v. *Stranahan*, 192 U. S. 470 25
Child Labor Tax Case, 259 U. S. 20 18
Cohens v. *Virginia*, 6 Wheat. 378 15
Crutcher v. *Kentucky*, 151 U. S. 438 24
Employers' Liability Cases, 207 U. S. 463 24
Gibbons v. *Ogden*, 9 Wheat. 1 ..... 2, 8, 9-11, 16, 21, 24
Gordon v. *Longest*, 16 Pet. 97 14
Groves v. *Slaughter*, 15 Pet. 449 ..... 2, 11-15
Hampton & Company v. *United States*, 276 U. S. 394 ..... 3, 5, 6, 17, 28
Head Money Cases, 112 U. S. 580 ..... 4, 18
Hill v. *Wallace*, 259 U. S. 44 18
In re Blake, 175 U. S. 114 14
Loan Association v. *Topeka*, 20 Wall. 655 18
South Carolina v. *United States*, 199 U. S. 437 ..... 7, 28
United States v. *Shallus*, 9 Ct. Cus. App. 168 25
Veazie Bank v. *Fenno*, 8 Wall. 533 ..... 4, 18

STATUTES: PAGE
Tariff Act of 1790, C. 39, 1 Stat. 180 29
Tariff Act of 1913, C. 16, Par. 573 29
Tariff Act of 1922, C. 356, Par. 218, 228, 360, 372, 42 Stat. 858, 922 4
Tariff Act of 1922, Tit. III, Sec. 304, 42 Stat. 936 22

MISCELLANEOUS:
Constitution of the United States:
Art. I, Sec. 8, Par. 17 22
Art. II, Sec. 8, Par. 3, Commerce Clause 20-21
Petition for Writ of Certiorari 3, 6
Brief for Petitioner 3, 6, 21, 25, 28
Petitioner's Reply Brief 3, 6, 21, 24, 25, 29
Story, Commentaries on the Constitution of the United States 2, 15-18
Willoughby, The Constitutional Law of the United States, V, I .. 18
V, II 24, 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITIONER'S PETITION FOR REHEARING

The Petitioner asks a rehearing in this case because:

1. The position of the Petitioner is inaccurately stated in the opinion, and, therefore,

2. The fundamental questions of law on which a decision on the merits necessarily turns have been neither examined nor decided by this Court.

3. The opinion conflicts with prior decisions of this Court, not discussed in the opinion, which appear to have been inadvertently overlooked and, therefore, not advisedly, though in fact, overruled.

4. The foundation principle of the opinion—that the customs duties here challenged may be sustained, at the option of Congress or this Court, as an exercise of either the power to tax or the power to regulate foreign commerce—seems to be rested principally upon a misinterpretation of language used in *Gibbons* v. *Ogden*, 9 Wheat. 1, 202, and Story on the Constitution, and especially upon a quotation which purports to come from the opinion of this Court in *Groves* v. *Slaughter*, 15 Pet. 449, 505, but which is in fact a secondary *obiter* observation from the specially concurring opinion of Justice McLean while giving his personal views upon a question (related to the very live issue of slavery, in 1841) said by him not to be "necessary to a decision of the case."

Theory of Opinion Not Responsive to Petitioner's Position

It seems that the decision is predicated upon the principle that the source of the Tariff Act of 1922 in general and in its entirety is the power to regulate foreign commerce, and that the Petitioner is not entitled to immunity from the exercise of this power. This conclusion concerning the Tariff Act of 1922 is in irreconcilable conflict with *Hampton & Company* v. *United States*, 276

U. S. 394; and Petitioner does not claim immunity, general or special, against the exercise of congressional power to regulate foreign commerce. It is, further, said that Congress, or rather, "the people of the United States act through a single government with unified and adequate national power" with respect to foreign intercourse and trade, and, therefore, the exaction must be paid alike by the States when bringing their own governmental instrumentalities into the country and by individuals engaged in private commerce. Any other conclusion, it is said, would "undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create."

These statements, undoubtedly sound in response to a certain contention, are as clearly not responsive to the true position taken by the Petitioner in this case. Brief for Petitioner, 2; Reply Brief, 12; Petition for Writ, 14. They are pertinent in support of the proposition that Congress may, under the commerce clause, levy exactions, in form taxes, in aid of regulation, and that the States cannot complain on that account, a proposition not put in issue by the facts, and not only not contested by Petitioner, but specifically conceded by its counsel,

and sustained in the *Head Money Cases,* 112 U. S. 580, and *Veazie Bank* v. *Fenno,* 8 Wall. 533.

The Holding

This Court holds that the import duties challenged are constitutionally imposed under the power to regulate foreign commerce and that the immunity of State governmental instrumentalities against federal taxation is inapplicable, notwithstanding

The Governing Statutes

here challenged provide that "There shall be levied, collected, and paid * * * upon all articles when imported from any foreign country into the United States * * * the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * * *

"Par. 360. Philosophical, scientific, and laboratory instruments * * * and parts thereof * * * 40 per centum ad valorem * * * * "

The foregoing language this Court holds to be the language of the commerce power; the Petitioner, on the contrary, respectfully but emphatically urges that it is the plain and natural language of the taxing power. This precise question is not discussed in the opinion.

If the foregoing and the other three virtually identical sections specifically challenged in this proceeding as not applicable to the Petitioner, be, as the opinion implies, held commerce regulations, *what* paragraphs in the Tariff Act of 1922 *are* for the purpose of raising revenue? Obviously, not one single paragraph in that whole Act of about sixteen hundred sections—nor in any other tariff act ever enacted, for that matter—can be pointed out which is enacted in execution of the title purpose "to provide revenue," for not a single one of them more distinctly or more baldly manifests an unmixed purpose "to provide revenue" than do the sections challenged. It seems to this Petitioner that the opinion, contrary to the conclusion in *Hampton & Company* v. *United States,* supra, not only divests the Tariff Act of 1922 of all its revenue aspects, but amounts to a holding that the English language cannot express a purpose "to provide revenue" in such a way that the government cannot henceforth successfully and when expedient, say that the purpose is "to regulate commerce." Moreover, from now on tariff acts may as appropriately originate in the Senate as in the House.

PETITIONER'S TRUE CONTENTION

The fundamental position of the Petitioner is, and

was in the Court below, that the *specific sections,* on which the Government relies to justify the imposition of the duties challenged, are tax and not regulatory paragraphs; and this fundamental position goes unnoticed by this Court, save for the sweeping generalization that the Tariff Act of 1922 is a regulation of commerce. See citations to Briefs, supra.

CONFLICT WITH PRIOR DECISIONS

In *Hampton & Company* v. *United States,* supra, at p. 411, Chief Justice Taft, speaking for this Court, said that customs revenue laws have in many instances been drawn since 1789 with the view to maintaining a system of protection; (p. 412) that so long as the motive of Congress is to secure revenue for the Government the existence of other motives, such as to protect domestic industry, is of no consequence; and he concludes (p. 412) by saying that the Act of 1922 is a "revenue act." In the instant decision the *entire* Act is treated as a regulation of commerce, and nothing else. As the Petitioner views the matter, this conclusion is not only without justification, in the light of the explicit language of provisions of the Act of 1922 which are here challenged, but it is in direct conflict with the above named decision of this Court.

The reasoning of this Court in *South Carolina* v. *United States,* 199 U. S. 437, is overruled without reference or discussion. There, among other things, Justice Brewer, speaking for the majority, said: "The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty."

The point of the observation was that if the contention of South Carolina were sustained, the State, by going into "private business," could dry up the sources of national income and destroy the Federal Government. This Court could not, it seems, say that the "same argument" would lead to the conclusion indicated by Justice Brewer, except for the fact that the implied prohibition against federal burdens on State governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if a customs duty could be sustained under the commerce clause, as this Court now seems to hold, plainly, Justice Brewer and those who agreed with him, could not say that "the same argument" would exempt the importation from duty, as, it was claimed, exempted the sale of liquor from the

excise tax. By no process of reasoning can the statement supra be harmonized with the language, theory, or result of the opinion in the instant case.

We have pointed to this reasoning of the highest Court in the country again and again, and stood on it in the face of the contention that the duty could be sustained under the commerce clause, and that the implied prohibition against burdening governmental instrumentalities of the State did not apply in the case of taxes levied upon imports; yet no court so far and no counsel for the United States Government has ever attempted to answer or explain away this obviously pertinent reasoning. We respectfully urge that the language quoted and the Justice who spoke it, and the concurring Justices for whom he spoke, should be accorded at least as deferential consideration as the secondary *obiter dictum* of Justice McLean, relied on in the opinion in the instant case.

We think, also, that the opinion cannot be reconciled with *Gibbons* v. *Ogden,* where Chief Justice Marshall clearly points out that the commerce and the taxing powers are substantive and distinct and that the levying of customs duties is an exercise of a branch of the latter. A more extended reference to this case follows.

Gibbons v. Ogden Misapplied

The opinion cites this case and Chief Justice Marshall as authority for the holding that the duties here challenged may "be imposed in the exercise of the power to regulate commerce." Opinion, 2. At page 202 Chief Justice Marshall uses the following words, in speaking of the members of the Constitutional Convention *at the time* that body was in session: "Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which *preceded* the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, *was* not controverted; but the right to impose a duty for the purpose of revenue, produced a *war* * * * * These restrictions, then, are on the taxing power, not on that to regulate commerce * * * * * "

It is respectfully but emphatically urged that the quotation above does not support the conclusion that customs duties may in the instant case or in all cases be sustained interchangeably under the power to regulate commerce and the power to tax. Indeed, in the next preceding paragraph the great Chief Justice had made it perfectly plain that the precise opposite was his own

view of the matter. He there had said concerning the commerce and the taxing powers: "The Constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes and that seems to be its natural place."

The portion quoted above and relied on in the opinion in the instant case, if taken in the sense it is seemingly taken by this Court now, amounts to a holding that the *source* of the power to levy customs duties is the commerce power; that is, that customs duties—for revenue —may be justified by invoking either power, according to current exigencies. This concept is completely negatived by the language used by Chief Justice Marshall on page 201; and the words used by Chief Justice Marshall, seemingly relied on by this Court now, show, undeniably as it seems to us, that he does not mean to say that *now* and *under* the Constitution duties may be levied under the commerce clause, but he means to say that *prior* to the revolutionary war the "right to regulate commerce, even by the imposition of duties, was not controverted." The context clearly supports this interpretation. He speaks of discussions *preceding* the revo-

lution; he then directly speaks of duties which brought on the revolutionary war, but in a clause immediately following the first statement and a part of the sentence containing the second, the Chief Justice says that it was not controverted that commerce could be regulated by the imposition of duties. It seems to us not only to violate the plain meaning of language, but to impute to the Chief Justice erratic thinking and intellectual steeplechasing to apply this language as an interpretation of the Constitution which came into existence long *after* the period he is describing.

With the utmost respect, but with the emphasis due a litigant whose rights we solemnly aver have been denied, we urge that *Gibbons* v. *Ogden* does not contain even a *dictum* to support the opinion in the instant case on the point that the Tariff Act of 1922, as a whole and in its various parts, may claim the commerce rather than the taxing power as its source.

Groves v. Slaughter

At pages 2 and 3 of the printed opinion this Court quotes from *Groves* v. *Slaughter,* 15 Pet. 449, 505. The quotation reads: "Under the power to regulate foreign commerce Congress impose duties on importations, give

drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property."

Plainly, it is here said that Congress has the power to regulate foreign commerce and may, under the commerce power, impose duties on importations; as plainly the language quoted should be accorded no weight, either from the standpoint of precedent or of reasoning. Our reasons for making this statement are, we think, wholly conclusive.

The impression received by the reader of the quoted portion on pages 2 and 3 is that (a) the language is that of the prevailing opinion of the Court, and (b) that the point was necessarily involved in the case. In both respects the impression is palpably erroneous.

In this case the suit was on a promissory note for $7,000 given in a transaction involving the purchase of slaves who were brought into the State of Mississippi. As stated in the prevailing opinion by Justice Thompson, on page 497 of the official report, "The defense rested entirely upon the alleged illegality of the consideration in the note." The validity of this defense turned upon the construction to be given to an article

in the Constitution of the State of Mississippi, adopted in October, 1832, to the effect that, "The introduction of slaves into this State, as merchandise, or for sale, shall be prohibited, from and after the first day of May, 1833 * * * * *" The slaves were imported into the State in the years 1835 and 1836. There was thus no question in the case concerning the power of Congress, under the clause granting control over foreign commerce, to levy customs duties. A precedent more alien, in any and all aspects, to the case at bar can scarcely be imagined.

The language quoted by this Court in the instant case does not appear in the main opinion written by Justice Thompson. It appears in the *specially concurring* opinion of Justice McLean, on page 505. Justice McLean discusses a point which he states is not involved in the case, saying: "And although the question I am to consider is not necessary to a decision of the case; yet * * * I deem it fit and proper to express my opinion upon it." The precise but foreign question discussed by Justice McLean was "whether this provision (in the Constitution of Mississippi) is in conflict with that part of the Constitution of the United States, which declares that Congress shall have power 'to regulate commerce

with foreign nations, and among the several States.'" It is thus clear that the language quoted in the instant opinion was not necessary even to a discussion of the point Justice McLean had stated. The statement is a *dictum* within a *dictum,* in a concurring opinion by one member of the Court, with which secondary *dictum* no other member concurred, and which no other Justice considered or discussed.

The author of this petition has no desire to enter into a discussion of the weight to be given *obiter dicta.* This Court has spoken to the point many times, and was, indeed, on at least one occasion, forced to sift and reject *dicta* from decided matter in an opinion by Justice McLean. In *Gordon* v. *Longest,* 16 Pet. 97, Mr. Justice McLean intimated, as this Court later said, that mandamus might lie to compel action by a state court, but in the case of *In re Blake,* 175 U. S. 114, this Court repudiated the pronouncement and said that it "cannot be regarded as authoritative." Nevertheless, the statement was in a prevailing and unanimous opinion, whereas, in the instant case the secondary *dictum* of Justice McLean, quoted in the instant opinion, was in a specially concurring opinion in which no other member concurred. Chief

Justice Marshall, in *Cohens* v. *Virginia,* 6 Wheat. 378, said, "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used * * * * Any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case calls for its expression." In *Bryan* v. *Bernheimer,* 181 U. S. 188, 197, the Court calls attention to a prior *dictum* and refuses to follow it because it was not on a point necessarily in the case. These are legal bromides, and we regret that what is doubtless an inadvertence makes it seem necessary even to advert to them.

It is respectfully submitted that this Court, in stating that "The contrary is well established," on the authority of *Groves* v. *Slaughter,* ascribes authority to a secondary *obiter* expression of a single judge far beyond the understanding of the bar concerning the value of secondary *dicta* in the concurring opinions of the judges.

The Citation from Story

The Court cites 2 Story on the Constitution, Sec. 1088, and quotes the same authority, Sec. 1087. Justice Story, in Vol. 2, Sec. 1069, of the same work, says:

"The laying of such imposts * * * often is used, as a mere regulation of commerce * * * * But the laying of such imposts and the duties is as certainly and more usually, a right exercised as part of the power to lay taxes * * * * * " Here, of course, lies the explanation of the statement quoted by this Court from Section 1087. The author cites *Gibbons* v. *Ogden,* 9 Wheat. 1, 201, 202. The comment on the commerce clause, found in Sections 1087 and 1088 is all based on the authority of Chief Justice Marshall in *Gibbons* v. *Ogden* and must, therefore, be construed and limited accordingly. As we have seen supra, Chief Justice Marshall was not speaking of the extent to which customs duties could be levied in order to regulate commerce *since* or *under* the Constitution but was saying that they had been so used *prior* to the adoption of that instrument.

It has never been questioned by any competent authority, certainly not by this Petitioner, that exactions, in form taxes, may be and often have been levied under the power to regulate commerce, and that and nothing more appears to be what Mr. Justice Story has reference to in the quoted portion of Section 1087. The reference to *Gibbons* v. *Ogden* emphasizes the conclusion that Story had in mind that the laying of im-

port duties pertained peculiarly to the taxing power, although exactions, called duties, might also be levied as a means to make a commerce regulation more effective. It cannot be supposed that he meant to confuse these powers and to obliterate the well established distinction between them.

We call attention to the fact that Sections 1087 and 1088, from Story, are from his general argument in favor of the system of protection to home industry, a then highly controversial question from both the legal and the economic points of view. Story's argument on this point has not been accepted *in toto* by this Court or by commentators. Story states the true and now accepted constitutional ground, on which the theory of protection is sustained, in Section 1086, when he says that Congress may "select and arrange duties" so as to "designedly protect domestic manufacturers." When Story goes farther and argues that the whole theory of protection may also be supported under the commerce clause, this court has refused to go with him, as the holding in *Hampton & Company* v. *United States*, supra, clearly shows, where it is held that Congress, under the *taxing* power, may select subjects for and so arrange the amounts of duties as to protect home in-

dustry and that the presence of this *motive* does not render a *"revenue* act" invalid. Indeed, we think that the principle on which *Hill* v. *Wallace,* 259 U. S. 44, *Child Labor Tax Case,* 259 U. S. 20, *Loan Association* v. *Topeka,* 20 Wall. 655, and other cases, were decided, supports the conclusion that an act of Congress which upon its face avowedly showed a purpose to make levies for the purpose of protection and wholly without regard to revenue, would be held to be an unconstitutional attempt to regulate the internal concerns—industry—of the States.

REGULATORY EXACTIONS AND TAXES DISTINGUISHED

In stating that Congress may levy duties under the commerce power, the opinion omits the well established distinction between the exercise of that power, in aid of the effective exercise of which duties or exactions in form taxes, are imposed, and the levying of duties or taxes where the constitutional purpose is revenue. This important distinction is clearly pointed out in 1 Willoughby on the Constitution of the United States 85-86, where pertinent quotations from the *Head Money Cases* and *Veazie Bank* v. *Fenno,* supra, are set forth. Petitioner has at all times maintained that the specific sections challenged are palpably, in purpose and intent,

revenue and not regulatory measures. Of this contention neither government counsel nor any court has so far taken notice, notwithstanding its seemingly fundamental importance.

Opinion Nullifies Certain Limitations

The conclusion that the Tariff Act of 1922 is, as *a whole*, a regulation of commerce, suggests some pertinent questions. On what principle is one clause, one statement of several expressed purposes, in the title held to fix the constitutional purpose of *every section* of the act? Is it henceforth to be the law that Congress may avoid the force of specific limitations upon its powers by the simple—not even ingenious—device of a multitudinous statement of purposes in the title in the hope that one statement may be found which may be held to give character to the whole and thus save *separable parts* against attack on the ground that they are in excess of granted powers? Is it to be the law henceforth that if a specific section of the Tariff Act be challenged as beyond the power of Congress under the commerce clause, the Government can find complete shelter behind the statement in the title that one purpose is "to provide revenue" and that, therefore, the whole act is a revenue meas-

ure? Logically, the answer must be in the affirmative.

Judicial sanction seems to be given a sort of legislative shell-pea game, with the result that a litigant who attacks a tariff act which is avowedly and clearly a revenue measure, say on the ground that it originated in the Senate, will be met with the answer that the act is "to regulate commerce," because that clause appears in the title, or because a few sections in or a motive for the act appear to concern commerce; and if he attacks specific sections, as Petitioner does here, on the ground that they are tax or revenue measures —the act having originated in the House on the supposition that it was for revenue—and cannot for that reason be applied to him, he is repulsed by the identical reply; and if the attack on such a revenue act, with such a conveniently comprehensive title, be because the duties are not uniform, he fails for the same reasons. It is respectfully suggested that certain specific constitutional limitations are swept away by the opinion.

Commerce Clause Unduly Exalted

There seems no escape from the conclusion that the

instant opinion exalts the commerce clause of the Constitution to a position of preeminence heretofore denied it by this Court. That this clause is subject to all limitations applicable to other provisions of the instrument has long since been established. See Brief for Petitioner, pp. 21-25. Beyond asserting that the implied prohibition against burdening State governmental instrumentalities has its own limitations, this Court does not discuss Petitioner's position to the effect that the prohibition applies to the customs tax challenged. See Brief for Petitioner, pp. 21-25; Petitioner's Reply Brief, pp. 13-15.

ONE ACT; SEVERAL SOURCES OF POWER

The Tariff Act of 1922 deals with an almost infinite variety of subjects in almost infinitely various ways. While the Constitution is the general source of power as to all, different sections of that instrument support different sections of the Act. This is, of course, common practice and Chief Justice Marshall in *Gibbons* v. *Ogden,* supra, points out that this often happens, and in *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, this Court points out that section one of the Sherman Anti-Trust Law finds its source in the commerce clause, whereas section three thereof

derives authority from Art. I, sec. 8, cl. 17 of the Constitution. Section 132 of the Tariff Act of 1922 (C. 356, Title III, sec. 304; 42 Stat. 936), for another illustration, is as clearly a regulation of commerce as the paragraphs here challenged are purely tax provisions.

States May Purchase Abroad

The State of Illinois may, under the Constitution and under existing acts of Congress, purchase the instrumentalities for its governmental operations in any market in the world; and the Petitioner does not suppose that this or any other tribunal would hold that the Constitution of the United States prevents the States from making such purchases. It is not until the States attempt to bring them into the country that its power can be made operative.

Nobody has contended that "The importation is a function of the State government independent of the federal power." That question is not in this case. Neither has anybody contended that "The control of importation * * * rests with the State" rather than with Congress. The power of Congress over importations is derived from the Constitution, as is every other power that body possesses, and is subject

to the limitations of that instrument; that control may be exerted under various powers, it is true; it may be exerted under the war and the treaty making power; it may be exerted directly under the specific grant of control over foreign commerce; and it may be exerted indirectly through the exercise of the power to tax. This Petitioner has never disputed, indeed through its counsel it conceded on the oral argument, that if the clauses of the Tariff Act under which the justification of the tax challenged was sought to be made, were held to be an exertion of the congressional power over commerce, the Petitioner had no standing in court. The Petitioner made and again makes this concession advisedly, and with the firm conviction that to sustain the exaction challenged as an exertion of the ordinary power over commerce is a perversion of plain English and a subversion of fundamental constitutional distinctions, breaking down the partition which separates the power over commerce from the taxing power.

Right to Import Not Created by the Constitution

While, as the opinion points out, "there is no vested right to carry on foreign commerce," and "the

control of importation * * * rests * * * with the Congress," propositions which this Petitioner has never questioned, it is equally well settled by numerous declarations of this Court that the right to engage in foreign and interstate commerce does not in any sense owe its existence to constitutional grant or "congressional enactment." 2 Willoughby on the Constitution of the United States 723. The Constitution "found it an existing right and gave to Congress the power to regulate it," says Marshall in *Gibbons* v. *Ogden,* supra, in speaking of interstate commerce. Obviously, this is true of foreign commerce as well. The States undeniably had the right to import their governmental instrumentalities before the Constitution; they surrendered to Congress the *control* over commerce intended otherwise to be free. *Gibbons* v. *Ogden,* supra. *Crutcher* v. *Kentucky,* 141 U. S. 438; *Employers' Liability Cases,* 207 U. S. 463; Reply Brief, 15-18. This Court in the *Employers' Liability Cases,* supra, repudiated an argument concerning an interpretation of the Constitution because it would destroy "that freedom of commerce which it was its purpose to preserve."

POWER TO PROHIBIT FOREIGN COMMERCE

This question is, in Petitioner's view, not in this case. Inasmuch as the leading case of *Buttfield* v. *Stranahan*, 192 U. S. 470, is cited in support of a broad claim of power under the commerce clause to exclude articles from foreign commerce, we call attention to the fact that high authority denies that this decision supports the conclusion that Congress has the power *arbitrarily* to exclude articles "irrespective of police considerations." 2 Willoughby on the Constitution of the United States, 726-27. An identical position has been consistently supported by Petitioner in this case in all courts, in response to the contrary suggestions. Petitioner's Reply Brief, 15 ff.; and see Brief for Petitioner, pp. 21-23.

LEGAL PROPOSITIONS NOT NOTICED BY THIS COURT

Respectfully we call attention to legal propositions seriously advanced by all the parties interested in this case, but which receive no attention in the opinion.

1. The fact is not considered that the Court of Customs and Patent Appeals itself defined a tariff duty as "a tax on imports." *United States* v. *Shallus*, 9 Ct. Cus. App. 168, 171. Brief for Petitioner, p. 18.

2. The Petitioner's attack is levelled at four specified paragraphs of the Tariff Act of 1922 which, upon their face, in terms, purpose and intent, are purely revenue or tax measures, and do not constitute commercial regulation. This Court seems to permit one clause, expressing a purpose to regulate commerce, in the title, to give character to the entire act.

3. If Congress can, under the guise of the power to regulate foreign commerce, levy duties on imports, it can also, under the guise of regulating foreign commerce, in fact, levy duties on exports, notwithstanding the Constitution prohibits a *tax* on exports.

4. The Petitioner has, at all times, maintained that the extent of the control which Congress may, under the Constitution as a whole, exercise over foreign commerce is not an issue in this case. Congress may and does control foreign commerce through other grants of power than the commerce clause, but there is no pretense that Congress has exercised any power to that end in the instant case, except what incidentally results from the use of the power to enact a tariff act. The specific contention is that four paragraphs of the Tariff Act of 1922 are tax measures and not regulations of commerce, a contention which the

majority of the lower court ignored, and of which this Court takes no notice. The bald fact is that the contention of the Petitioner has not been accurately stated, and therefore, has, so far, gone without pertinent judicial answer.

5. The distinction has been repeatedly pointed out that the cases cited in the first complete paragraph on page 2 of the opinion in support of the proposition that Congress has the power to exclude importations altogether, had to do, in the main, with importations of commodities in themselves inherently or potentially harmful, or were embargo cases where, under powers other than the commerce power, importations were, for the time being, suspended or stopped. That question is not in this case; and even if Congress have the power, which we do not deny, to prohibit importations in many instances, and perhaps of all kinds of commodities, in the exercise of various powers, the question is not here, because the sections challenged are not prohibitions upon importations, are not regulations of commerce, but are specific and direct tax sections.

6. The practice of the Congress, ever since the Constitution was adopted, to originate Tariff acts in

the House, in conformity with the requirement that revenue measures must originate therein, seems to be given no consideration.

7. If an ordinary tariff act, like that of 1922, is held to be a commerce regulation rather than a revenue measure, the vitally important requirement of uniformity in the levy of customs duties has been stricken from the Constitution. Brief for Petitioner, p. 20.

8. *Hampton & Company* v. *United States,* supra, is overruled.

9. The reasoning of *South Carolina* v. *United States,* supra, is silently repudiated.

10. The fundamental principle on which the opinion is grounded is supported by reference to a *dictum* and to an argument by Story in behalf of protection, which latter has been, in principle, repudiated by this Court in *Hampton & Company v. United States,* supra.

In justice to the Legal Departments of the several States which joined in this proceeding, the Petitioner desires to say that the theory on which the instant case was founded was not formulated in haste; that

the resolution to take proceedings to test the validity of the imposition challenged in the circumstances of this case was not reached until after deliberate consideration. The entire structure of the legal argument, in both the Court of Customs and Patent Appeals and in this Court, was built up after many months of careful study. We have felt that the case was important; that it was not a frivolous proceeding; and that the questions raised had not really become live issues until the adoption of the Tariff Act of 1922 (42 Stat. 858, 922), Paragraph 573, Tariff Act of 1913 (38 Stat. 161), exempted "philosophical and scientific apparatus" in language almost identical with the Tariff Act of August 10, 1790. Petitioner's Reply Brief, pp. 2-3. This is a notorious fact and explains why this constitutional question gets into the United States Supreme Court now for the first time. This Court is deciding new constitutional questions every day, although the Constitution is 145 years old. There is no presumption that a question is unimportant simply because it has never been brought into court before.

For all the reasons stated above, we think a rehear-

ing should be ordered in this case and respectfully petition this Court to that end.

Respectfully submitted,

SVEINBJORN JOHNSON,
Counsel for the Petitioner

OTTO KERNER,
Attorney General of Illinois